IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 690 of 1982

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

R N DOODHWALA

Versus

ARVINDLAL J POTHIWALA

Appearance:

MS KJ BRAHMBHATT for Petitioners Nos.1/2 and 1/3

Petitioner No.1/1 deleted

MR NK MAJMUDAR for Respondents Nos. 1 and 2

Respondents Nos. 3/1 and 4 deleted

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 24/09/2002

ORAL JUDGEMENT

This Revision Application preferred under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as 'the Rent

Act') arises from the judgment and order dated 1st October, 1981 passed by the learned Extra Assistant Judge, Vadodara in Civil Appeal No.355/1977. The petitioners before this Court are the heirs and legal representatives of the defendant no.1.

The plaintiff instituted Regular Civil Suit No.421/1969, which was transferred to the Court of Small Causes, Vadodara and re-numbered as Rent Suit No.21/1975, for recovery of the possession of the suit premises. The suit premises is part of a building bearing Municipal Census No.323 situated at Dandiya Bazar, Vadodara. The plaintiff sought recovery of the possession of the suit premises on the grounds, inter alia, that the defendant no.1 had sublet part of the suit premises to the defendant no.2 and had parted with the possession of part of the suit premises in favour of the defendant no.2. The defendant no.2 had renovated the part of the suit premises in his possession and had started business of hotel in the name of 'Dreamland Hotel'. The plaint was subsequently amended and the eviction was sought also on the ground of arrears of rent.

The suit was contested by the defendant no.1 by filing written statement (Ex.25). The defendant no.1 denied the allegations made in the plaint. The defendant no.1 claimed that on 14th October, 1968 the defendant no.1 had entered into partnership with the defendant no.2 and the defendants nos.1 and 2 together had started the 'Dreamland Hotel'. The defendant no.1 continued to be the tenant of the suit premises and also in possession thereof. As to the amended plaint, the defendant did not file written statement.

The learned trial Judge, under the judgment and order dated 27th October, 1977, dismissed the suit. The learned trial Judge, though held that the partnership alleged was sham and bogus, was of the opinion that parting of the possession of the suit premises in favour of the defendant no.2 was not established. The subletting having thus not been proved, the plaintiff was not entitled to a decree for eviction. As regards the arrears of rent, the learned trial Judge held that the defendant no.1 was in arrears of rent since 1st October, 1968. However, was protected by Section 12(3)(b) of the Rent Act. The defendant no.1 satisfied the conditions mentioned in the said Section 12(3)(b) i.e. before the first day of hearing (i.e. the day of framing of the issue on 11th August, 1977), the defendant no.1 had tendered the entire amount of arrears of rent in the Court and that on the date of the decree, something more

than due was deposited.

Feeling aggrieved, the plaintiff preferred Civil Appeal No.355/1977 in the Court of District Judge, Vadodara. The learned Extra Assistant Judge, Vadodara, under the impugned judgment and order dated 1st October, 1981, allowed the appeal and passed the decree for possession of the suit premises. Feeling aggrieved, the defendant no.1 has preferred the present Revision Application.

Ms.Brahmbhatt has submitted that the Court below has manifestly erred in holding that the defendant no.1 had sublet the suit premises to the defendant no.2. She has submitted that it was absolutely legal and valid for the defendant no.1 to enter into partnership with the defendant no.2 and run the hotel in the suit premises. The defendant no.1 did not transfer the tenancy either to the defendant no.2 or to the partnership firm. Besides, the plaintiff has failed to establish that the defendant no.1 had parted with the possession of the suit premises. In absence of such material evidence the plaintiff can not be said to have discharged the obligation to prove that the defendant no.1 had sublet the suit premises to the defendant no.2. She has submitted that the Court below has erred in drawing inference against the defendant no.1 and in holding that the alleged partnership was sham and bogus and that, in fact, the defendant no.1 had sublet the suit premises to the defendant no.2. She has also submitted that the Court below has erred in recording a finding that the defendant no.1 was not ready and willing to pay the rent and that he was not protected by Section 12(3)(b) of the Rent Act. In support of her contentions, Ms.Brahmbhatt has relied upon the judgments of this Court in the matters of MEHTA JAGJIVAN VANECHAND V/S. DOSHI VANECHAND HARAKHCHAND & ORS. [12 G.L.R. 487]; of MANCHHARAM SOBHRAJ AND ORS. V/S. JAMNADAS MULCHAND AND ANR. [16 G.L.R. 898] and of M/S. RAMESHCHANDRA K.PATWA AND ORS. V/S. VITHALDAS CHIMANLAL AND ORS. [1993(1) G.L.R. 193]. She has also relied upon the judgment of the Punjab and Haryana High Court in the matter of NANDU MAL AND ORS. V/S. RAMJI LAL AND ANR. [A.I.R. 1952 PUNJAB 403].

The learned advocate Mr.N.K.Majmudar has appeared for the plaintiff and has contested the Revision Application. He has supported the judgment of the Court below and has submitted that the Court below has rightly drawn inference against the defendant no.1 to hold that the defendant no.1 had sublet the suit premises to the defendant no.2. He has also submitted that the learned

Judge having appreciated the evidence and recorded finding against the defendant, this Court, exercising revisional jurisdiction, shall not interfere with the same. In support of his contention, he has relied upon the judgments of this Court in the matters of DUDABHAI @ DUDUBHAI KARSANDAS PATEL AND ORS. V/S. SULOCHANABEN GOPALDAS KOTHARI [1994(1) G.L.R. 541] and of SHAH CHATRABHUJ NARSHI AND ANR. V/S. NENSIBHAI SHAVANJIBHAI GOHIL AND ANR. [1980 G.L.R. 377]. He has also relied upon the judgment of the Hon'ble Supreme Court in the matter of K.ACHYUTA BHAT V/S. VEERAMANENI MANGA DEVI AND ANR. [A.I.R. 1989 S.C. 93]. With respect to the revisional jurisdiction of this Court, Mr.Majmudar has relied upon the judgments of the Hon'ble Supreme Court in the matters of RAMDOSS V/S. K.THANGAVELU [(2000)2 S.C.C. 135] and of VANEET JAIN V/S. JAGJIT SINGH [A.I.R. 2000 S.C. 2080]. Mr.Majmudar has also relied upon the judgments of this Court in the matters of KANAIYALAL L.RANPARA AND ANR. V/S. DAHYALAL P.TANK [2001(1) G.L.H. 273] and of BOTAD TRANSPORT V/S. MEMAN AMADBHAI DAUDBHAI [2001(1) G.L.H. (U.J.) 4].

Both the learned advocates have extensively read over the judgments of the Courts below and also the evidence on record. Ms.Brahmbhatt has strenuously urged that parting of the possession of the suit premises by the defendant no.1 in favour of the defendant no.2 has not been proved. Besides, the plaintiff has also failed to prove the exchange of consideration for the alleged sub-tenancy. She has, therefore, submitted that no case of subletting of the suit premises has been made out and no decree for eviction could have been passed against the defendant no.1. She has also relied upon the observations made by the learned trial Judge to prove that the defendant no.1 had tendered the amount of arrears of rent before the date of framing of the issue and that on the date of the decree no rent was due from the defendant no.1. She has relied upon the affidavit filed by one of the heirs of the defendant no.1 and the detailed statement given alongwith it to bring home the issue that even pending the appeal the defendant no.1 had regularly tendered the rent in the Court. The defendant no.1 is, therefore, entitled to protection under Section 12(3)(b) of the Rent Act. Therefore also, no decree for eviction could have been passed against the defendant no.1.

In the matter of Mehta Jagjivan Vanechand (supra), on facts, the Court found that the tenant took the defendants nos.2 and 3 as his partners. Since then, the tenant alongwith the said two partners carried on

business in the suit shop for the benefit of the partnership. The partnership deed contained a covenant that the tenancy right continued to vest unto the tenant and that the defendants nos.2 and 3 who joined as partners had not acquired any interest in the tenancy right belonging to the tenant. The Court held that "...Unless it can be posited that the original tenant's entire interest has been extinguished and that of someone else to the exclusion of the original tenant created, it is futile to contend that there has been an assignment. Even if the tenancy interest had been thrown into the partnership (unlike the present case) the answer would not have been favourable to the landlord. Even in such a case the tenant continues to have an interest alongwith his two partners in the tenancy rights. He is not divested of his interest altogether....It is, therefore, not necessary to demonstrate any further that it can not constitute assignment."

In the matter of Manchharam Sobhraj (supra), a similar question arose before this Court once again. The Court held that "...If a tenant takes a partner in the firm it does not amount to unlawful subletting." The Court further held that "...A tenant can not be his own sub-tenant. Therefore, in order to prove subletting in a case of this type it must necessarily be shown that the tenant has transferred his legal possession of the premises to his other partners to his exclusion." However, the Court also held that "if a tenant walks out of the premises in his possession and allows a third party to carry on his own business under a sham or camouflage partnership with the tenant it may amount to an act of unlawful subletting by the tenant if the camouflage partnership has been entered into for the purpose of screening the act of unlawful subletting."

In the matter of M/s.Rameshchandra K.Patwa (supra), the eviction was sought on the ground of subletting. It is held that "...Before landlord is entitled to a decree for possession on the ground of subletting, he will have to satisfy the Court that the tenant has parted with possession of the entire suit property or part thereof in favour of a third party who is in exclusive possession thereof and there is monetary consideration." The Court further held that "...It is only after the factum of possession is proved that the enquiry regarding nature of possession would arise and in absence of satisfactory explanation or relevant circumstances, it may be open to a Court to infer that the tenant has parted with possession by creating sub-tenancy in favour of third person." On the facts, the

Court held that, it was not established that the defendant no.6 (the alleged sub-tenant) was found to be in physical possession of the suit property or any part thereof. There was no evidence that particular part was either given to or retain by the defendant no.6.

In the matter of Nandu Mal (supra), the eviction was sought on the ground that the tenant sublet the suit shop to a third person. The Court found that the tenant had entered into a partnership with the third person to carry on the business of manufacturing of ice-cream. It was contended on behalf of the landlord that it was not a partnership. Having regard to the terms and conditions of the partnership, the Court agreed with the contention. However, the Court held that "it is not every transaction by the lessee with a third party which must amount to a transfer, subletting or parting with possession." In the case before the Hon'ble Court, the Court held that, it may be the intention to part with the possession, but in the absence of evidence it was impossible to come to the conclusion that the said intention was carried out. The Court dismissed the appeal by the landlord on the ground that the landlord had failed to establish that there was subletting or parting with possession of the premises.

The one principle that emerges on the reading of the above judgments is that, taking a partner in the business by a tenant does not amount to subletting. To prove the subletting, the landlord is required to establish that there was in fact the parting of possession or assignment of interest to a third party to the exclusion of the tenant.

In the matter of Dudabhai @ Dudubhai Karsandas Patel (supra), the tenant entered into a partnership and took partners into the business. Later the tenant got out of the partnership and the other partners carried on the business on their own in the premises. The Court held that, the result would be that the tenant had transferred the factual and the legal possession of the shop to his erstwhile partners and the inference would be that the same was for a consideration. The Court held that "...Once it is proved that in relation to a business premises the tenant has walked out of the premises leaving the premises to another person, (may be, that another person may be his brother) and that another person is in exclusive possession of the business premises, it would not be out of place to raise an inference that parting of possession by the tenant in favour of that another person must be for a valid consideration and the burden would be upon the tenant or

the sub-tenant, as the case may be, to prove that parting of possession - both legal and physical - by the tenant in favour of that other person was without any valid consideration."

The Division Bench of this Court in the matter of Shah Chatrabhuj Narshi (supra) distinguished the judgments in the matters of Mehta Jagjivan Vanechand v. Doshi Vanechand Harakhchand & Ors. [12 G.L.R. 487] and Manchharam Sobhraj & Ors. v. Jamnadas Mulchand & Anr. [16 G.L.R. 898]. The Court held that, in our opinion, therefore, the real crux of the problem is, whether the tenancy rights are thrown into partnership assets or for that matter any interest is created therein in favour of the incoming partners. The Court on facts held that, under the partnership agreement in question there was an assignment of the tenancy rights in the suit premises in favour of the new firm, and the tenant had rendered himself liable for being evicted therefrom under Section 13(1)(e) of the Rent Act.

In the matter of K.Achyuta Bhat (supra), the Hon'ble Supreme Court, considering the terms of agreement between the tenant and the third party, held that, it was a subletting and the tenant was liable to be evicted. The Court was of the opinion that, the clauses of the agreement which were relied upon to project the tenant's case were only make-believe clauses which had been introduced with a design and purpose viz. to conceal the real nature of the contract so that the landlord may not seek the eviction of the tenant on the ground of subletting the premises. On facts the Court held that, the third party was not a transferee of managing rights alone but, he was a transferee of the business together with the tenant's interest in the leased premises also. The Court, thereupon, proceeded to confirm the decree of eviction passed by the High Court.

In the matter of Ramdoss (supra), the Hon'ble Supreme Court has reiterated that in exercise of revisional power under the State Rent Control Act, the High Court can examine the correctness of the finding of facts but, it is impermissible for the High Court to reassess the evidence in a revision petition. Same is the view expressed by the Hon'ble Supreme Court in the matter of Vaneet Jain (supra) and by this Court in the matters of Kanaiyalal L.Ranpara (supra) and of Botad Transport (supra).

It is true that there is no evidence on record to establish that the defendant no.2 was inducted in the

suit premises for consideration. However, such consideration being the matter within the personal knowledge of the defendant no.1, the onus would lie on the defendant no.1. I am of the view that the approach of the learned trial Judge was erroneous. The learned trial Judge did find that the partnership deed (Ex.122) produced by the defendant no.1 was of doubtful character i.e. the said partnership deed was found to be sham and bogus. However, the learned trial Judge held that the plaintiff had failed to establish that the defendant no.2 was put into the exclusive possession of the suit premises, and therefore, the elements of subletting were not established. The Court below has dealt with the evidence extensively and in great details. It also found the partnership deed (Ex.122) to be sham and bogus. It has given cogent reasons for holding the partnership deed to be sham and bogus. In my view, it has rightly held that the defendant no.1 had sublet the suit premises to the defendant no.2 and that the partnership deed was drawn to screen the act of subletting.

In the present case, it has not come on the record that the defendant no.1, having taken the defendant no.2 as a partner, himself walked out of the partnership leaving the business and the suit premises exclusively in possession of the defendant no.2 over the partnership. The judgment in the matter of Dudabhai Dudubhai Karsandas Patel (supra) relied upon by Mr.Majmudar shall have no applicability to the facts of the present case. Nevertheless, the evidence on record suggests that the alleged partnership is a camouflage partnership entered into for the purpose of screening the act of unlawful subletting. The defendant no.1 has, in his evidence, admitted that through out the period of partnership he was selling ice on the platform (otla) outside the suit premises. Besides, he has also admitted that he has received a fixed amount every month and that he has not received anything out of the profit of the partnership business. It has also come on record that it was the defendant no.2 who run the partnership business of 'Dreamland Hotel'. It was he who maintained the accounts, who hired and paid the staff, who brought the furniture, etc. I am, therefore, of the opinion that the Court below is right in holding that the alleged partnership was sham and bogus and, in fact, the defendant no.1 had sublet the suit premises to the defendant no.2.

As to the arrears of rent, it is indisputable that the defendant no.1 was in arrears of rent since 1st October, 1968, but was protected by Section 12(3)(b) of

the Rent Act. It has also come on record that before the date of framing of the issue the defendant no.1 had tendered the entire amount of arrears of rent in the Court. It is also indisputable that on the date of the decree no rent was due from the defendant no.1. Though, I do not agree with the reasoning of the Court below that to avoid decree of eviction the amount of arrears of rent was required to be paid by the defendant no.1 within one month from the date of receipt of the suit notice, still the defendant no.1 has forfeited the right to protection under Section 12(3)(b) of the Rent Act by his subsequent conduct. It is well settled that to earn protection under Section 12(3)(b) of the Rent Act, a tenant is required, inter alia, to tender the rent regularly every month. Such regular payment is required to be made even during the pendency of the appeal. On perusal of the affidavit and the statement filed in this Court, it appears that since the date of the decree the first payment of the rent was made by the defendant no.1 on 6th August, 1979. Ms.Brahmbhatt has vehemently argued that on the date of the decree not only no rent was due from the defendant no.1, but he had also made additional payment of Rs.345=00. Even after taking into consideration the deposit of the said sum of Rs.345=00, on 6th August, 1979 the defendant no.1 was in arrears of rent for some 15 months. Hence, it can not be said that the defendant no.1 had deposited the rent regularly every month as and when it fell due. Hence, the defendant no.1 is liable to be evicted on the ground of arrears of rent also.

For the aforesaid reasons, the Revision Application is dismissed with costs. Rule is discharged. Interim stay is vacated.

The learned advocate Ms.Brahmbhatt requests that the interim stay operating pending the Revision Application be continued for three months. The request is granted. The interim stay granted pending the Revision Application shall stand continued upto 15th December, 2002, on the same terms and conditions.

(Ms. R.M. Doshit, J.)

/sakkaf